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Nos. 95-797; 95-818

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

OWENS-ILLINOIS, INC.,
Petitioner,

vs.

MONTY J. REKDAHL, et al.,
Respondents.

OWENS-CORNING FIBERGLAS CORPORATION,
Petitioner,

vs.

MONTY J. REKDAHL, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION THREE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Due Process Clause permit the admission of evidence of the defendants' financial condition to guide the jury in assessing the amount necessary to punish and deter, and to allow meaningful review of the reasonableness of the amount of the punitive damages awarded?

2. Does the Due Process Clause require a court, when reviewing a punitive damages award for excessiveness, to consider and/or set aside punitive damages awards imposed against the defendants *when they declined to present evidence in the trial court of prior awards made and paid*?

3. Is the amount of the first awards of punitive damages in California asbestos litigation reasonable (a) in light of the defendants' reprehensible death-dealing conduct through which, knowing full well the dangers of asbestos, the defendants advertised their product as safe and "non-toxic," continued to manufacture and supply a hazardous product, and failed to provide warning labels, and (b) when compared to the extraordinary wealth of each defendant?

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1995

No. 95-797
No. 95-818

OWENS-ILLINOIS, INC.,
OWENS-CORNING FIBERGLAS CORPORATION,
Petitioners,

v.

MONTY J. REKDAHL, et al.,
Respondents.

On Petition for Writ of Certiorari to the \
California Court of Appeal,
Second Appellate District, Division Three

RESPONDENTS' BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondents, Monty J. Rekdahl and Sara M. Rekdahl submit a combined response to the Petitions for Writ of Certiorari submitted by Petitioners, Owens-Illinois, Inc. and Owens-Corning Fiberglas Corporation. The Rekdahls respectfully request that this Court deny the Petitions.

OPINIONS BELOW

The opinion and order of the California Court of Appeal and the order of the California Supreme Court denying review are not officially reported. The opinion and order are reproduced in the Appendices submitted with the Petitions of Owens-Illinois, Inc. [hereinafter OI] and Owens-Corning Fiberglas Corporation [hereinafter OCF].

JURISDICTION

Respondent adopts the Statement of Jurisdiction in the Petitions with this exception: The issue of whether the punitive damage awards violated due process because OI and OCF were subjected to prior awards of punitive damages for the same course of conduct was not presented to the trial court. Since the issue was not preserved for appellate review, the California Court of Appeal did not decide the question. The issue, therefore, is not properly presented to this Court. S. Ct. R. 10(c), 14(g).

STATEMENT

I. The Facts: This is the *first* punitive damages case in asbestos litigation in California.

Monty Rekdahl worked for the Navy at the Long Beach Naval Shipyard in the 1950's, and at a ship repair facility in Guam in the 1960's and early 1970's. His work exposed him to asbestos dust. In April of 1991, doctors diagnosed malignant mesothelioma, a fatal asbestos-related

cancer. (OI Appendix [hereinafter OI A.] 2a.) Soon after trial, Mr. Rekdahl died from the mesothelioma.[1]

Kaylo is pipe insulation which, until 1972, was reinforced with asbestos fibers. OI developed, produced and marketed Kaylo from 1943 to 1958. In 1953, OI entered into a distribution agreement with OCF whereby OCF would sell Kaylo. In 1958, OI sold its Kaylo Division to OCF. OCF marketed Kaylo as Kaylo, and under different names for other manufacturers. OCF also rebranded and sold asbestos-containing products under OCF's name. (OI A.4a n.3, 57a.) The defendants knew the dangers of asbestos, advertised Kaylo as a safe and "non-toxic" product, continued to manufacture and supply a hazardous product, and failed to provide warning labels. (OI A.69a.)

II. Trial Court Proceedings: The trifurcated trial commenced on January 21, 1992. In Phase I, the parties litigated the issues of causation and damages. The jury returned a special verdict finding Monty Rekdahl had a malignant mesothelioma caused by exposure to asbestos, and awarded him $964,219 in economic damages and $2.5 million in non-economic damages. The jury awarded Sara Rekdahl $1 million for her loss of consortium claim. (OI A.3a.)

The purpose of Phase II was to apportion liability and determine whether punitive damages should be imposed. OCF claims it introduced evidence showing that

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[1]Although Mr. Rekdahl has died, for simplicity's sake, we refer to the plaintiffs here as we did in the trial court as the Rekdahls.

its Kaylo complied with existing government and industry standards, and suggests it is thus immune from punitive damages.[2] (OCF Pet. 4, 6, 10.) The trial court explicitly found there was insufficient evidence to support the government contractor defense; the reviewing court agreed that appellants failed to provide the evidence required to establish this defense. (OI A.16a-17a.) As to industry standards, at trial, the evidence established that OCF never conducted any tests to determine just how much asbestos its products released into workers' breathing space. (Record [hereinafter R.] 1912.) Obviously, without testing, OCF could not know whether it met any kind of standards.

OCF also contends it complied with OSHA warning label requirements before they went into effect in 1971-1972. (OCF Pet. 10.) The fact is that OCF, knowing full well it was exposing users to horrible diseases, did not

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[2]OCF describes the proceedings in the Court of Appeal and California Supreme Court in terms of its arguments rather than the record where the evidence might be found. (OCF Pet. 4-7.) This Court's rules require citation "to the places in the record where the matter appear so as to show the federal question was timely and properly raised . . . ." S. Ct. R. 14(g).

We remind OCF that argument of counsel is not evidence. *See, e.g., Dameshghi v. Texaco Ref. & Mktg., Inc.*, 3 Cal. App. 4th 1262, 1283, 6 Cal. Rptr. 2d 515 (1992). We object to OCF's one-sided portrayal of the case. Under California law evidence is reviewed in the light most favorable to the prevailing party. *Nestle v. City of Santa Monica*, 6 Cal. 3d 920, 101 Cal. Rptr. 568 (1972). The reviewing court accepts respondent's evidence as true, resolves all conflicts in respondent's favor, and draws all favorable inferences that may reasonably be drawn in favor of the respondent. *Hasson v. Ford Motor Co.*, 19 Cal. 3d 530, 544, 138 Cal. Rptr. 705, 714 (1977)

label its products until prompted by OSHA in 1972 (R.2135), just before OCF substituted wood pulp for asbestos in Kaylo, and long after Monty Rekdahl was exposed to Kaylo OCF distributed without any warning whatsoever. (OI A.57a.) The truth is that OCF did not place labels on its products warning that asbestos causes disease because doing so would have put the manufacturer at a competitive disadvantage: "You would have a little harder selling job." (R.1921.)

On special verdict, the jury found that OI's and OCF's Kaylo was defective, and the defect was the legal cause of Monty Rekdahl's injury. The jury apportioned liability 42.5 percent to OI, 42.5 percent to OCF, and the remainder to other culpable entities. The jury further found by clear and convincing evidence that OCF and OI acted with malice or fraud and that punitive damages should be imposed on OI and OCF. (OI A.3a-4a.)

In Phase III, the only issue was, "How much?" (OI A.73a.) The trial court ruled that the defendants could introduce evidence of the profitability of Kaylo, the imposition of punitive damage awards by other juries, and the possibility of potential future claims. Neither defendant offered admissible evidence of prior punitive damages awards. (OI A.52a; R.4280, 4297-98, 4301-04.) The jury imposed punitive damages of $4 million against OI and $4 million against OCF. (OI A.4a.)

III. The Appeals: After examining the entire record, the California Court of Appeal held (1) there was substantial evidence both defendants deliberately exposed Monty Rekdahl to products they knew caused cancer and

other asbestos-related diseases (OI A.56a-58a); (2) the award satisfied due process because:

(a) the trial court properly instructed the jury with California pattern instructions that go beyond the Alabama instructions this Court approved in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (OI A.59a-63a);

(b) California's standard of review meets the criteria established in *Haslip*, the defendants took full advantage of California's posttrial review procedures, including review in the trial court which exceeded that in *Haslip*, and was constitutionally sufficient under *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2724 (1993) (*OI A.*63a-66a); and thus (c):

> California procedures used in this case afforded OCF and OI appropriate due process considerations, in conformance with *Haslip* and *TXO*. The procedures did not provide the jury unguided discretion in determining the amount of the punitive damage award. The award is not "grossly excessive," so as to conclude that it was the result of "passion or prejudice."

(OI A.67a.)

Both defendants filed petitions for rehearing which were denied. (OI A.71a-73a.) Both defendants sought review in the California Court; not a single justice voted to hear the case. (OI A.91a.)

REASONS FOR DENYING THE WRIT

OI and OCF contend that this case presents unsettled questions concerning the proper legal analysis for determining whether successive jury awards of punitive damages are constitutionally impermissible. OI also asks the Court to determine whether a jury may consider a defendant's wealth in determining punitive damages.

The defendants have waived any right to complain to this Court about successive punitive damage awards because neither of them presented any admissible evidence in the trial court of prior punitive damages awards imposed and paid. As a consequence, the issue was not preserved for review in the California Court of Appeal, and could not properly be presented for review to the California Supreme Court. Neither the California Court of Appeal nor the California Supreme Court decided an important federal question. S. Ct. R. 10(b), (c), 14(g). This -- the first award of punitive damages in asbestos litigation in California -- is not in need of the Court's attention.

Asbestos companies have already sought and been denied certiorari on the same issues raised here.[3] The petitions in the instant case should also be denied.

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[3]*See, e.g., Kochan v. Owens-Corning Fiberglas Corp.*, 242 Ill. App. 3d 781, 610 N.E.2d 683, *cert. denied*, 113 S. Ct. 2335 (1993); *Johnson v. Owens-Corning Fiberglas Corp.*, 233 Ill. App. 3d 425, 599 N.E.2d 129, *cert. denied*, 113 S. Ct. 2335 (1993); *Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir.), *cert. denied*, 114 S. Ct. 650 (1993).

I. DEFENDANTS' PERCEPTIONS ABOUT PUNITIVE DAMAGES ARE NOT SUPPORTED BY EMPIRICAL STUDIES

OI commences its petition with a sweeping attack on punitive damages based upon gross statistics. (OI Pet. 5-6.) OI's argument does little more than illustrate the adage that one can prove anything with statistics. T. Melsheimer, S. Stodghill, *Due Process and Punitive Damages: Providing Meaningful Guidance to the Jury*, 47 S.M.U. L. Rev. 329, 331-332 (1994) (punitive damages in personal injury cases has changed very little in 25 years). OCF mounts a similar, though less defined, attack. (OCF Pet. 12.) When subjected to critical analysis, both assaults fail.

Punitive damages have both critics and adherents. Opponents, relying primarily on anecdotal accounts, characterize punitive damages as out of control with respect to frequency and amount, and warn that they represent a crushing effect on large corporations like OI and OCF who must also pay compensatory damages in thousands of cases.[4] *See*, T. Schwartz, *Punitive Damages and Regulated*

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[4]OI claims it has been sued by tens of thousands of persons claiming to have been injured by exposure to Kaylo. (OI Pet. 3.) This claim is not substantiated by the record on appeal. OCF also claims it has been sued by hundreds of thousands of persons for injuries caused by its Kaylo. (OCF Pet. 3.) OCF submitted no proof of these assertions in the trial court although it made unsubstantiated claims in briefs to the Court of Appeal.

At trial, both defendants fought hard and long to keep evidence of prior punitive damages awards out of evidence. Furthermore, there was no evidence that either defendant had ever paid *any* punitive damages. (OI App. 50a-52a & n.19.)

Regulated Products, 42 Am. U. L. Rev. 1335, 1356-58 (1993) [hereinafter Schwartz]. Of course, the reason there are so many lawsuits against OI and OCF is *because* they deliberately engaged in an egregious pattern of misconduct over many, many years and destroyed the lives of thousands of persons exposed to their toxic products -- including California citizens like Monty Rekdahl.

Proponents of punitive damages explain that "[t]he history of the rise of the doctrine of punitive damages is a part of the struggle of individuals to preserve their rights against the mighty." M. Rustad, T. Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 Am. U. L. Rev. 1269, 1285 (1993). Exemplary damages are necessary to punish and deter in order to protect the consuming public from egregious corporate misconduct.[5] *Id.* at 1310, 1312. Punitive damages imposed because of injury to many, many persons affected by corporate misconduct will necessarily be greater than an award rendered for a single plaintiff in a single action. *Cf., Delos v. Farmers Ins. Group, Inc.*, 93 Cal. App. 3d 642, 667, 155 Cal. Rptr. 843 (1979).

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[5]As many as 200,000 persons will die from asbestos-related diseases by the end of this century. S. Labotan, *Judges' Panel, Seeing Court Crisis, Combines 26,000 Asbestos Cases*, N.Y. Times, July 30, 1991. Many of these deaths, including Monty Rekdahl's, resulted from manufacturers' active concealment of the dangers of asbestos.

Of course, as the persons exposed to OI and OCF asbestos products die off from age and illness, the number of cases actually prosecuted against asbestos manufacturers will rapidly abate. At trial, the evidence established that the number of annual filings is declining. (R.4213-25.)

Empirical studies show that the anecdotal accounts cited by the media and critics are anomalies and, in reality, punitive damages are granted with striking rarity to individuals in product liability suits against manufacturers,[6] and when they are, the sums awarded tend to be modest, especially when posttrial adjustments are taken into account.[7] Schwartz, 42 Am. U. L. Rev. at 1358 & nn.

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[6]OI concedes that juries do not routinely award punitive damages, pointing out that most juries have not imposed punitive damages against OI, and noting on the same evidence one jury awarded punitive damages but the second did not. (OI Pet. at 9 n.7.)

[7]A very recent Justice Department study showed that punitive damages are awarded in only a tiny fraction of civil cases and half are for less than $52,000. In a study of state civil suits in the nation's 75 largest counties, Justice Department's Bureau of Justice Statistics found that in 1992 there were 762,000 civil suits involving torts, contracts and real property rights. The overwhelming majority of cases, 750,000, never reached a jury. Jurors ruled on only 12,000 cases. In those, the plaintiffs won 6,200 and lost 5,800. Punitive damages were awarded in only 364 cases, or six percent. U.S. Dept. of Justice, Bureau of Justice Statistics, Special Report 1 (July 1995). Similar findings were reported by the National Center for State Courts, *Litigation Dimensions: Torts and Contracts in Large Urban Courts*, 19 State Ct. J. 23, 27-29 (1995). Little has changed since an earlier study revealed that between 1974 and 1990 there were 161,686 product liability cases in the federal system and many more in the state system. Yet, there were only 355 cases in which punitive damages were awarded. Schwartz, 42 Am. U. L. Rev. at 1358-59 & nn. 148-51.

Indeed, in the very study OI cites to support its claim that punitive damages are out of control in California (OI Pet. 6), the authors found just the opposite: Punitive damages awards in personal injury cases were fewer than in other classes of litigation. M. Peterson, S. Sarma, M. Shanley, *Punitive Damages, Empirical*

(continued...)

148-51. The media seldom report on reductions or eliminations of these awards during posttrial proceedings. Schwartz, 42 Am. U. L. Rev. at 1359. California trial courts and reviewing courts do reduce excessive punitive damages, and the larger the award the greater the remittitur. Rand at 28; *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (reviewing court reduced excessive punitive damages from $125 million to $3.5 million).

As one of America's beloved philosophers warned, "If it ain't broke, don't fix it." *See, S.G. Borello & Sons, Inc. v. Dept. of Indus. Relations*, 48 Cal. 3d 341, 360, 256 Cal. Rptr. 543 (1989) (Kaufman, J., dissenting) (quoting Will Rogers). The California system of punitive damages provides procedural and substantive due process in excess of this Court's mandates in *Haslip, TXO and Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994). It does not need fixing.

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[7](...continued)
Findings, Rand Inst. for Civ. Just. iii-iv (1987) [hereinafter Rand]; *accord*, T. Melsheimer, S. Stodghill, *Due Process and Punitive Damages: Providing Meaningful Guidance to the Jury*, 47 S.M.U. L. Rev. at 331-32. The authors in the Rand study "did not find an epidemic of punitive awards in products cases . . . ." Rand at 13; *see also*, W. Pittman, B. Nettles, *Debate: What Is the Role or Function of Punitive Damages?* 24 Cumb. L. Rev. 451, 456-57 (1993) (reporting similar findings in Alabama). The public perception that punitive damages means big numbers is not supported by the data. In fact, the largest punitive damage award for a San Francisco personal injury was in the early *1960's*; it had a 1984 value of $1.6 million. *Id.* at 17, 22. Punitive damage awards in personal injury and product cases are not "skyrocketing." (OCF Pet. at 12.)

II. EVIDENCE OF THE DEFENDANTS' WEALTH HELPS THE JURY DETERMINE THE AMOUNT OF PUNITIVE DAMAGES AND ASSISTS THE REVIEWING COURT EVALUATE THEIR REASONABLENESS

OI urges this Court to grant certiorari to determine whether evidence of a defendant's wealth is admissible in a punitive damages case. (OI at 8-9, 15-16.) The plaintiffs maintain that California properly allows admission of evidence of the defendant's wealth to guide the jury in determining how much is necessary to punish and to deter, and to assist the reviewing court in evaluating the reasonableness of the sum awarded.

In *Haslip*, this Court viewed the "financial position" of the defendant as a key factor in determining the reasonableness of a punitive award. *Haslip*, 49 U.S. at 22. In *TXO*, the Court did not squarely approve admission of evidence of the financial condition of the defendant, but did not criticize the fact that the defendant's wealth is a factor "typically considered in assessing punitive damages," and noted that many states permit the jury to take account of the defendant's wealth.[8] *TXO*, 113 S. Ct. at 2722 & n.28, 2723 & n.31. A defendant's wealth is merely one aspect of its financial condition, and is permissible post-*Haslip*. *Continental Trend Resources, Inc. v. OXY USA Inc.*, 44 F.3d 1465, 1475 (10th Cir. 1995).

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[8]Forty-three states allow evidence of financial condition for the jury to consider in assessing punitive damages and, as in California, many states *require* the introduction of such evidence. T. Melsheimer, S. Stodghill, *Due Process and Punitive Damages: Providing Meaningful Guidance to the Jury*, 47 S.M.U. L. Rev. at 337 n.44.

California has recognized that *Haslip* presents a "clear constitutional mandate for meaningful judicial scrutiny of punitive damage awards." *Adams v. Murakami*, 54 Cal. 3d 105, 118, 284 Cal. Rptr. 318 (1991). The *Adams* court held that a plaintiff must present evidence of a defendant's financial condition so (1) the jury can make a rational award of damages, and (2) the reviewing court can evaluate the reasonableness of the award. *Id.* at 110, 122-23. The court declined to prescribe any rigid standard for measuring a defendant's ability to pay. *Id.* at 116 n.7.

In *Cummings Medical Corp. v. Occupational Medical Corp.*, 10 Cal. App. 4th 1291, 1298, 13 Cal. Rptr. 2d 585 (1992), the appellate court held that punitive damages may properly be based on evidence of a defendant's gain from its misconduct. However, the court cautioned that its holding was not to be construed to mean that profitability was the only means by which the trier of fact could calculate punitive damages. *Id.* at 1300 n.8.

Punitive damages are supposed to sting. Otherwise, they are insufficient to fulfill the twin goals of retribution and deterrence. Evidence of the financial condition of the defendant is necessary to guide the jury in deciding how much is necessary to punish and deter. *Neal v. Farmers Ins. Exchange*, 21 Cal. 3d 910, 148 Cal. Rptr. 389 (1978); *Delos v. Farmers Ins. Group, Inc.*, 93 Cal. App. 3d at 667 (award which is insufficient to punish and deter just as legally unsound as one which overpunishes). Evidence of financial condition enables the reviewing court to evaluate whether the amount the jury assessed is reasonably calculated to satisfy those goals without overpunishing. *Adams*, 54 Cal. 3d at 118; J. Mallor, B. Roberts, *Punitive*

Damages: Toward a Principled Approach, 31 Hastings L.J. 639, 648-49 (1980).

OI asserts that it is particularly egregious to punish an out-of-state corporation for its misconduct in California by assessing damages based upon the corporation's financial success in "unrelated endeavors." (OI Pet. at 15-16.) There are two answers. First, the out-of-state corporation placed its defective products into California's stream of commerce, and those products killed a California citizen. Second, that same out-of-state corporation still sells its products and generates profits from doing business in the State. Surely OI's success in "unrelated endeavors" is partly owing to the fact it has availed itself of the huge California market. Having taken advantage of the California economic market then and now, OI should not be heard to complain that it has to pay punitive damages in California.

OI next complains that the trial court refused to give instructions limiting consideration of defendant's wealth to the actual profit OI expected to reap from Kaylo. (OI Pet. at 16-17.) That is true. The court refused to do so because such an instruction is contrary to California law. (OI A.62a-63a.) But, despite OI's contention, the record reflects the Rekdahl jury was given appropriate guidelines to award punitive damages. California pattern instructions go beyond the Alabama instructions the Court approved in *Haslip* by explicitly directing the jury to fashion an award bearing a relationship to the actual harm and to consider the defendant's financial condition in determining whether the award is sufficient to punish and deter. *Boyle v. Lorimar Productions, Inc.*, 13 F.3d 1357, 1360 (9th Cir. 1994); *Las Palmas Associates v. Las Palmas Center*

Associates, 235 Cal. App. 3d 1220, 1257, 1 Cal. Rptr. 2d 301 (1991) ("these instructions offer the same degree of protection against arbitrary jury decisions as found constitutionally acceptable in *Haslip*").

In the instant case, the Rekdahls presented evidence of OI's (and OCF's) financial condition, including assets, net worth, cash, and so on; OI presented evidence of its alleged lost profits from Kaylo. The reviewing court held that the requirements of *Adams* and *Haslip* were met when the jury was instructed to consider defendant's financial condition. The trial court was not required to use OI's preferred "profitability" standard. (OI A.63a & n.23.) The instructions given guided the jury's deliberations in conformance with *Haslip* and *TXO*, (OI A.67a.)

"[A] punitive damage award is excessive if it is disproportionate to the defendant's ability to pay." *Adams*, 54 Cal. 3d at 112. The amounts of punitive damages were reasonable when considered in juxtaposition with the financial position of each defendant. Both are multi-billion dollar, multi-national corporations with annual incomes counted in the millions of dollars and rising asset and stock values. (R.4182-92, 4204-10.) Both have millions of dollars in unexhausted insurance to cover future claims. (R. 4318-20, 4360, 4365-66.) A $4 million punitive damage award may force OI and OCF to sit up and take notice, but it surely is not excessive when compared to the corporations' incredible wealth and decades-long, death-dealing misconduct.

On this record, there is no need for the Court's intervention. The Rekdahls ask the Court to deny the petitions.

III. THERE WAS NO SUBSTANTIVE DUE PROCESS VIOLATION BECAUSE NEITHER OI NOR OCF INTRODUCED EVIDENCE IN THIS CASE OF ASSESSED AND PAID PUNITIVE DAMAGES IN PRIOR CASES

OI and OCF complain that repeated punishment for their past misdeeds violates principles of substantive due process. Both argue that juries in many cases have imposed punitive damages on them. (OI Pet. 9; OCF Pet. 11.)

The Rekdahls will make three points. First, the issue is not properly before this Court because the defendants elected not to raise it in the trial court, did not preserve the issue for review in the Court of Appeal, and thus could not properly raise it in the California Supreme Court.[9]

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[9]Neither defendant presented proof in the trial court that it ever *paid* a dime punitive damages *prior* to those imposed in the instant case. OI cites to an unpublished opinion as evidence that a jury awarded $250,000 in punitive damages against it, but the citation does not support the claim. (OI Pet. 9 n.7.) OI also cites *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1289 (2d Cir.), *cert. denied*, 498 U.S. 920 (1990), as a case wherein the reviewing court affirmed $1.8 million in two cases. (OI Pet. 9 n. 7.) OI presented no evidence of this matter at trial; it is unknown whether it ever *paid* the judgment.

OCF claims that as of February 1994, 38 juries imposed $77 million in punitive damages. (OCF Pet. 3.) Apparently, since the verdict in this case was rendered in 1992, OCF has included the damages awarded here. Presumably it also included a $25 million jury award in *Dunn v. HOVIC*, 1 F.3d 1371, which was remitted to $1 million. (R.4342-49; OI A.53a-54a.) As of March of 1992, OCF represented to the public in its SEC filings that it had not paid any of

(continued...)

Second, under California law, the amount of punitive damages deemed necessary to punish and deter is determined at the time of trial, in this case March of 1992. Accordingly, the defendants' claim to substantive due process violations must be evaluated in light of the sums needed to punish and deter in 1992.

Third, the Rekdahls agree that sometime, somewhere, juries will have imposed exemplary damages in an aggregate sum sufficient to punish and deter, the defendants will introduce competent evidence of amounts they have paid, and any further awards will violate substantive due process. That day has not yet arrived -- or at least had not arrived when the Rekdahl matter was tried.

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[9](...continued)
the awards against it, did not claim at trial that it had ever paid any punitive damages, does not provide data to this Court indicating what happened to the awards in posttrial proceedings, and still does not say how much, if anything, it paid in punitive damages prior to 1992 or since.

At trial, the evidence established that both companies are paying less per asbestos claim now than in the past, and both expect to pay less per claim in the future. (R.4253.) The amount of insurance available to OI and OCF is sufficient to pay off all claims at these values. (R.4253-59.) In this Court, however, OCF laments the fact it purportedly has taken a charge against earnings to cover potential future liability for uninsured costs. (OCF Pet. 3.) A "charge against earnings" is merely a bookkeeping device by which a company creates a paper reserve to provide for possible future liabilities. It does not mean that OCF must pay, has paid, or will pay, anything at all. The "charge" does have the attractive advantage of being a tax deduction. (R.4326-28.)

A. The Defendants Did Not Preserve the Issue of Successive Punitive Damages Awards for Review by This Court

OI and OCF have waived any error relating to the issue of successive punitive damages.

Under the Court's rules, a petitioner must cite to the portion of the record where the challenged matter appears in order to show that the federal question was timely and properly raised. S. Ct. R. 14(g). Further, the Court has traditionally declined to review "a state court's resolution of an issue of federal law if the state court's decision rests on an adequate and independent state ground." *Sochor v. Florida,* 112 S. Ct. 2114, 2119 (1992) (failure to object to jury instruction precluded review); *cf., Chambers v. Mississippi*, 410 U.S. 284, 302-303 (1973) (states afforded wide latitude in developing procedural rules).

In California, an issue not preserved in the trial court will not be considered by the Court of Appeal, and a theory not raised in the trial court cannot be asserted for the first time on appeal.[10] *Ernst v. Searle*, 218 Cal. 233, 240-41, 22 P.2d 715 (1933); *North Coast Business Park v. Nielsen Const. Co.*, 17 Cal. App. 4th 22, 28-29, 21 Cal. Rptr. 2d 104 (1993). Where a deliberate trial strategy results in an outcome disappointing to the advocate, the

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[10]The rule is the same in other jurisdictions. In *Johnson v. Celotex Corp.*, 899 F.2d at 1287, the court declined to consider the argument of one defendant that multiple imposition of punitive damages for the same course of conduct violated due process because the defendant did not raise the issue in the trial court.

lawyer may not later use that tactical decision as the basis to claim prejudicial error on appeal. *Mesecher v. County of San Diego*, 9 Cal. App. 4th 1677, 1686, 12 Cal. Rptr. 2d 279 (1992); and see, *Pat Rose & Assoc. v. Coombe*, 225 Cal. App. 3d 9, 23-24, 275 Cal. Rptr. 1 (1990) (failure to present evidence on an issue is waiver of claim of error on that issue on appeal).[11]

In this case, the defendants argued in the Court of Appeal that (1) the trial court erroneously excluded evidence of prior punitive damage awards assessed against them, (2) their proffered evidence should have been admitted to permit the jury to consider other awards assessed against them, and (3) evidence of their significant liability would show the awarding of punitive damages in mass-tort litigation is inappropriate where the objectives of punishment and deterrence had already been met by prior damages awards. (OI A.49a-50a.) But, the Court rejected the arguments because defendants' position was not supported by the record. (OI A.50a.)

What really happened is that the defendants wished to introduce evidence of punitive damages awards, and testimony regarding the deterrent effect of those awards, *through an expert*. The trial court excluded admission of the evidence through the expert, but told the defendants, "[Y]ou can use it." (OI A.50a-51a.) Thereafter, as a matter of trial strategy, defendants argued *against* allowing evidence of multiple punitive damage awards in tort litigation, made a motion to exclude any consideration of

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[11]Disapproved on other grounds in *Adams v. Murakami*, 54 Cal. 3d at 116.

prior awards by the jury, and did not offer any evidence of prior punitive damage awards. (OI A.51a-52a.) The reviewing court rejected the defendants' attempt to argue one way in the trial court, and another way in the reviewing court:

> The record reveals that when defendants' punitive damage arguments are put in their proper context, the argued issue presented to the trial court of whether punitive damages should be given the jury, is *not* the issue presented to this court of whether defendants should have been allowed to present evidence of multiple damage awards that have been assessed against them.

(OI A.53a (emphasis added).)

If an issue is not preserved in the trial court, and therefore not passed on by the Court of Appeal, the California Supreme Court will not consider the issue either. *Tiernan v. Trustees*, 33 Cal. 3d 211, 221 n.15, 188 Cal. Rptr. 115 (1982) (court would not consider theory contemplating facts not presented at trial). OI and OCF claim they raised the issue in the California Court of Appeal and the California Supreme Court. (OI Pet. 4; OCF Pet. 5, 7.) However, the defendants did not -- and could not -- *properly* raise a due process claim with respect to successive punitive damage awards because they did not preserve the issue in the trial court. The defendants may not by-pass a state court procedure by not offering evidence, then argue that the result is substantively unconstitutional. *See, Yee v. City of Escondido*, 112 S. Ct. 1522, 1528-29 (1992).

In *Johnson v. Celotex*, 899 F.2d 1281, OI advised the trial court of punitive damages awards made, but not paid in two prior cases. However, OI did not provide any documentation as to exactly how much money it actually paid in punitive damages. Therefore, the record was insufficient to permit an examination of OI's claim that there was a multiple award of punitive damages offensive to the fundamental fairness inherent in due process. *Id.* at 1287-88.

In this case, since the defendants by-passed state procedure by not offering evidence of prior punitive damage awards, they cannot comply with this Court's rule requiring reference to the record where the perceived error was preserved. S. Ct. R. 14(g). The record is insufficient to permit examination of their due process claim. In *TXO*, the Court declined to consider an issue not properly presented to the highest state court. 113 S. Ct. at 2723-24. As in *TXO*, the Rekdahls ask the Court not to pass on the issue. Out of the proverbial abundance of caution, however, plaintiffs address the defendants' arguments.

B. Successive Punitive Damages Are Not Per Se Unconstitutional

Both defendants challenge the constitutionality of successive awards of punitive damages.

Every court that has considered the question has concluded the Fourteenth Amendment does not insulate a manufacturer of a defective product from successive punitive damage awards based on the marketing of the product. *See, e.g., Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d at 808-09; *Dunn v. HOVIC*, 1 F.2d at 1385-

86; *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1096-97 (5th Cir.), *cert. denied*, 112 S. Ct. 1778 (1991); *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022, 1031-33, *cert. denied*, 497 U.S. 1057 (1990); *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 280-83 (2d Cir.), *cert. dism.*, 497 U.S. 1057 (1990).

OI complains that California courts have completely failed to consider whether aggregate punitive damages violate due process. (OI Pet. 13.) This simply is not true. In *Grimshaw v. Ford Motor Co.*, the reviewing court expressed the policy of this State. If defendants are confronted with the possibility of a punitive award in a subsequent case for the same conduct, the defendant can raise the issue of successive awards in the next case. 19 Cal. App. 3d at 812; see also, *Magallanes v. Superior Court*, 167 Cal. App. 3d 878, 889-90, 213 Cal. Rptr. 547 (1985) (expressing concern over possibility of repeated punitive damage awards in market share cases).

OI also suggests that the California courts erroneously hold that the issue of repetitive punitive damages awards is simply a factor the jury can consider. If the reviewing courts conducted the initial analysis, they would be obliged to hold that OI could not be subjected to yet another punitive damage award. (OI Pet. at 13-15.) What OI forgets is that since it presented no admissible evidence of repetitive awards or payments of punitive damages in the trial court, there was nothing for the reviewing court to review, with or without the jury's consideration of the point. (OI A.53a.)

The Rekdahls have no quarrel with the general principle that the amount of punitive damages paid in the

past may be a relevant factor a jury could consider in assessing punitive damages in a particular case. Nonetheless, the Rekdahls maintain that in order to preserve the twin goals of deterrence and punishment, the defendants must present competent evidence that they have paid prior awards, and those payments were sufficient to punish and deter. (R.4122-23.) If, having heard that evidence, the jury nonetheless imposes additional damages, the reviewing court can undertake a meaningful inquiry -- based on the evidence -- into the issue of whether past awards and payments of punitive damages were indeed sufficient to punish and deter and another award would violate due process.

This is the approach adopted by the Second Circuit in *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277. In *Simpson*, defendant Pittsburgh Corning sought to avoid a punitive damage award based on a claim it had already paid punitive damages for the same course of conduct. *Id.* at p. 280. The reviewing court disagreed. Assuming that a civil litigant has a due process right to protection from repetitive punitive damage assessments, the defendant could make such a showing in one of two ways. In the "single punitive award" approach, the defendant could show it had previously been punished for the full extent of its wrongful conduct, not merely that it had been *assessed* a sum appropriate to punish it for injuries to particular plaintiffs. Or, under the "aggregate punitive award" approach, the defendant could show that the sum of all punitive damages awards it had paid reached the maximum tolerable under the due process clause. Since the defendant presented no proof of either alternative, the court rejected its claim. *Id.* at 280-81; *see also, Kochan v. Owens-Corning Fiberglas*

Corp., 610 N.E.2d at 694 (defendant bears burden of proof on this question).[12]

Inasmuch as the defendants presented no proof of either alternative, the California Court of Appeal rejected their claim. The Rekdahls ask this Court to do the same.

C. At the Time of Trial Neither Defendant Had Actually Paid Any Punitive Damages

In California, the reasonableness of the amount of punitive damages is measured against the defendant's financial condition at the time of trial. *Mariott v. Williams*, 152 Cal. 705, 710, 93 P. 875 (1908); *Washington v. Farlice*, 1 Cal. App. 4th 766, 777, 2 Cal. Rptr. 2d 607 (1991).

At the time of trial, OCF represented to the whole world in its public filings with the SEC that *all* of the punitive awards against OCF were on appeal, and the company believed *all* of them would be vacated on appeal. (R.4342-44, 4346.) Obviously, OCF could not make a legitimate claim at the time of trial that it had paid punitive

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[12]OI states the burden is on the plaintiff to prove a negative, that is, the total amount of punitive damages assessed against the defendant in prior cases does not exceed a reasonable amount. (OI Pet. at 12-13.) Although OI cites *Haslip*, 499 U.S. at 21, in support of the assertion, the Court did not so hold. When the issue has been raised, reviewing courts have universally placed this burden on the defendant. Implicit in the Court of Appeal's opinion here is that defendants bear the burden of producing evidence showing they have been sufficiently punished. (OI A.52a ("defendants did not try to introduce any evidence of prior punitive damages . . . .").)

judgments in a sum sufficient to punish and deter. OI elected not to introduce competent evidence that it had paid any punitive damage awards.

Someday, the defendants will actually pay punitive damages. Somewhere, in some case, they will present to the finder-of-fact competent evidence of those payments. The day will come when the fact finder will say, "enough" -- OI and OCF have paid sufficient punitive damages to satisfy society's goals of deterrence and retribution for their egregious course of misconduct which cost so many so much pain, suffering, and death. The day will come when a reviewing court will have admissible, competent evidence in the record on appeal from which it can conclude that yet another award would be constitutionally intolerable.

But in this case, as of March of 1992, OCF asserted in public SEC documents, which were admitted into evidence, that it had not paid, and did not expect to pay in the future, any punitive damages. Although less clear with respect to OI, it introduced no evidence on the issue. Since punitive damages are measured by the defendants' financial condition at the time of trial, and the properly instructed jury did just that, there is nothing for this Court to review.

IV. EVEN IF THIS COURT DECIDES *BMW* FAVORABLY TO THAT DEFENDANT, THE JUDGMENTS IN THIS CASE WILL NOT CHANGE

Both defendants profess to find great similarities between this case and *BMW of North America v. Gore*. The issues in *BMW* bear little resemblance to the issues OI and OCF will raise in this Court. First, in *BMW*, the Alabama jury awarded punitive damages based not on the defendant's fraud against a single plaintiff, but upon the multiple frauds involved in refinished vehicles sold throughout the United States. By contrast, California jury instructions, which were given here, make it clear that the jury could punish the defendants only for their reprehensible conduct against the individual plaintiff. (R.2236-37 (punitive damages must bear reasonable relation to damage "actually suffered by the plaintiff").)

Second, the relationship between punitive damages in the *Rekdahl* case is nowhere near 500 times the amount of compensatory damages it was in *BMW*. The Rekdahls' compensatory damages were nearly $4.5 million. Punitive damages imposed on each defendant were $4 million. Since punitive damages are assessed individually, the ratio of punitive damages to compensatory damages is slightly less than 1 to 1.

Third, OCF's claim that it is insulated from punitive damages because its conduct matches that of BMW (i.e., OCF labeled its Kaylo and otherwise complied with industry standards) is not supported by the record or case law. (Pet. 10.) Before 1972, OCF *never* warned that exposure to its products could cause disease. (R.2729-30.) There were no federal regulations at all, and no state

regulations in states where Mr. Rekdahl used OCF products. The "American Conference of Governmental Industrial Hygienists" cited by OCF as evidence of compliance with government standards was merely a voluntary group of interested persons who met periodically to make recommendations concerning industrial hygiene.[13] (R.2029.) *See, Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). In addition, OCF did not conduct any tests to see if dust levels generated by the use of Kaylo fell within voluntary limits suggested by the Conference. (R.1920-21, 2033.) Tests conducted by outsiders revealed substantially higher counts than those recommended by the American Conference.[14] (R.2206; Rekdahl Ex. 141.)

Even *if* there had been government and industry standards, and even *if* OCF had complied with them, it would not be immune from punitive damages under California law. One reason punitive damages developed is *because* "[g]overnmental safety standards and the criminal

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[13]In 1946, this volunteer organization recommended that as a threshold limit value (TLV), workers should not be exposed to asbestos-laden dust which exceeded 5 million parts per cubic foot (MPPCF) of air. (R.2029-30.) However, as early as 1947, it was known in the industry that exposure limited to 5 MPPCF did not assure safety. (R.2008.)

[14]Aetna Insurance did a study in an OCF factory in 1958. The samplers found dust counts of 91.8, 41, and numerous others over 5 MPPCF. (R.2053, 2146, 2206.) The factory had these very high dust counts despite the presence of ventilators and respirators. Field workers, like Mr. Rekdahl and others, did not have ventilators and exhaust systems. (R.2206, 2054.)

law have failed to provide adequate consumer protection against the manufacturer and distribution of defective products." *Grimshaw*, 119 Cal. App. 3d at 810.

Finally, from what members of bench and bar could glean from the tenor of argument in *BMW*, the punitive damages issues which appeared to concern the Court in *BMW* are totally different from the issues OI and OCF have raised here. *BMW* provides no reason for certiorari in this case.

Both defendants suggest that this Court should grant and hold the petitions until its decision in *BMW*. OI asks the Court to vacate the judgment, and remand the case to the California Court of Appeal for reconsideration of this Court's ruling in *BMW*. A remand in light of *BMW* on the issue of multiple awards would not affect the judgments because neither OI nor OCF offered evidence on that issue. Simply put, there is nothing for the Court of Appeal to review anew.[15] Since there is no evidence to re-review, the Court may rest assured that if it remands the case, the

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[15] "Delay of justice is injustice." *People v. Hartman*, 170 Cal. App. 3d 572, 216 Cal. Rptr. 641 (1985). From notice of appeal in California (6/12/92) to petition for certiorari in this Court (11/21/95), the appeals process consumed nearly three and one-half years. Much of the delay was caused by the defendants' procedural ploys in the Court of Appeal, including repeated requests for extensions of time to file briefs and for continuances of oral argument. After obtaining extensions, defendants routinely waited until the very last day to perform every act required during the appellate process. While plaintiffs recognize the defense entitlement to invoke legal means to postpone payment of the judgment, ethically and morally it is difficult to justify such deliberate and avoidable delays in the appellate processes.

result will be the same, another round of appeals will ensue and this Court can expect to see the same matter sometime in 1998 or 1999. The Rekdahls asks this Court to deny the petitions so that society's goals of punishment and deterrence finally may be satisfied.

CONCLUSION

Justice Potter Stewart declared that due process simply means that the litigant be given "'the opportunity to be heard' . . . at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The trial court gave defendants that opportunity; they declined to take advantage of it. *A fortiori*, the defendants waived any claim of error with respect to successive punitive damages awards in the California Court of Appeal, the California Supreme Court, and in this Court. There is nothing for this Court to review.

"[W]hen our neighbors do wrong, we sometimes feel the fitness of making them smart for it, whether they have repented or not." O.W. Holmes, Jr., *The Common Law* 45 (1881). It is time for petitioners to pay. Respondents ask the Court to deny the petitions for review so that they may at long last put this matter to rest.

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Respectfully submitted,

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